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Nos. 82-206 and 82-229

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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FIREFIGHTERS LOCAL UNION NO. 1784,
*Petitioner,*
v.
CARL W. STOTTS, *et al.*,
*Respondents,*
and
MEMPHIS FIRE DEPARTMENT, *et al.*,
*Petitioners,*
v.
CARL W. STOTTS, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, AS AMICUS CURIAE

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## BRIEF OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, AS AMICUS CURIAE

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### INTEREST OF THE IAFF AS AMICUS CURIAE *

The International Association of Fire Fighters, AFL-CIO (IAFF) is an unincorporated association comprised of municipal, state, and federal fire fighters throughout

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* This brief is filed with the consent of all parties. The letters of consent have been filed with the Clerk of the Court.

the United States and Canada. The current membership includes approximately 153,000 state and municipal fire fighters employed by states, cities, and towns across the United States.

The IAFF's objectives include promoting and securing improved wages, hours, and working conditions of fire fighters through collective bargaining, legislation, legal action, and other appropriate means.

The IAFF here represents the interests of its many members across the country who are facing, or may face, the prospects of layoffs caused by fiscal exigencies such as those which were carried out by the City of Memphis, and who are employed pursuant to seniority systems established by state and/or local laws, policies and practices.

The prospects of reductions-in-force in these jurisdictions are not merely conjectural. In a report issued by the Bureau of National Affairs, figures released showed that layoffs of state workers occurred in fiscal year 1981 in 43 of the 50 states, while in fiscal 1982, 44 states either experienced layoffs or anticipated them by the end of the year. "Layoffs, Rifs, and EEO in the Public Sector, A BNA Special Report," Government Employee Relations Report, GERR No. 949, February 8, 1982, pp. 13-15.

The financial situation among local governments similarly indicates a stark outlook. In a survey of 100 cities, 62 laid off or were expecting to layoff employees in fiscal year 1982. Many of these jurisdictions are covered by civil service laws which contain seniority-based layoff provisions that determine the order in which employees will be furloughed in work force reductions. Like Memphis, many cities whose firefighters are members of the IAFF have also entered into consent decrees to settle employment discrimination lawsuits. Government Employee Relations Report, supra, at 23-36. There is no indication that the financial problems of state and local governments

will significantly improve in the near future, and the prospects for continued reductions-in-force remain substantial.

## ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

This brief addresses a central question in this case: May a federal court grant special layoff protection to junior minority employees who are not identified victims of discrimination, and thereby cause the layoff of innocent senior white employees, simply because layoffs in accordance with a bona fide seniority system would delay the attainment of minority employment goals agreed to in a consent decree?

The minority-conscious percentage goals which constituted the justification for the lower courts' rulings stemmed from settlements in two employment discrimination cases challenging hiring and promotion practices in the City of Memphis. Both cases were settled without any findings of discrimination by the District Court and both settlements contained a specific disclaimer of any wrongdoing by the City. The consent decrees memorializing the settlement terms set long term hiring goals for minorities in the various City departments, including the Fire Department, recognizing the attainment of these goals to be "subject to the anticipated budgeted vacancies in the City." Union Pet. 3, fn. 3. They further provided that for purposes of promotion, transfer and assignment, total City-wide seniority, rather than departmental seniority, of individual employees would be considered. No retroactive or constructive seniority was awarded by either decree and neither layoffs, reductions in rank nor recall rights were covered. Union Pet. App. A59-A69; Joint App. 98-115.

The instant proceeding was triggered by a shortfall in City finances in the spring of 1981, which the City proposed to cure by a reduction in personnel in all City departments. Since 1973, the City had in place a seniority

system which utilized an employee's initial date of hire with any City department as the basis for the accrual of seniority for all purposes.[1] No layoffs having been contemplated before 1981, the City had not before promulgated a specific layoff policy, although its memoranda of understanding with various labor organizations, including Firefighters Local 1784, did provide for layoffs to occur on a last-hired, first-laid-off basis.[2] Joint App. 37-38, 49. In 1981, the City did promulgate such a policy. Joint App. 82-96. That policy called for an intricate seniority-based procedure for lay-offs and recalls which may be summarized as follows:

> 3. Seniority Determination
>
> A. Layoffs shall occur within a classification, based upon city-wide seniority which shall be determined on the basis of actual date of continuous service from the latest date of permanent employment. . . .
>
> B. When an employee's position in a given classification is abolished or eliminated, the employee occupying that position shall have the right to bump the least senior employee within that classification city-wide, or go on layoff status. . . .
>
> D. Employees who are unable to bump into their own classification but who have obtained permanent status in a previously held city-funded classification have the option to bump, in lieu

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[1] This policy was incorporated into the 1974 decree as well as the City's labor memoranda with petitioner Firefighters Local Union No. 1784. Union Pet. App. A80; Joint App. 37-38, 49.

[2] The Memorandum of Understanding with Local 1784 provided:

> In the event it becomes necessary to reduce the Fire Division, seniority alphabetically shall govern lay-offs and recalls. Employees lowest in seniority shall be laid off first and shall be the last to be recalled. Members laid off shall be given thirty (30) days notice prior to the effective date of lay-off.

Joint App. 119.

> of being laid off, the least senior employee in a city-funded position in that same classification.
>
> * * * *
>
> 6. Recall Procedure
>
> When a job is to be filled in a given classification, it shall be offered to the most senior employee within the same classification who is on the layoff roster. Vacancies shall continue to be offered according to descending order on the roster.

Joint App. 85, 86, 89.

The City's layoff policy was not adopted with a discriminatory purpose. Union Pet. App. A11, A73, A78. The application of the policy in 1981 did however have an adverse impact on some minority employees. Those who had benefitted from the earlier consent decrees by being hired by the Fire Department had been accorded seniority as of their dates of entry into the City's workforce. They had not been found to be victims of discrimination and had received no rightful place seniority relief in the decrees. Thus, seniority-based reductions in force, concededly neutral, affected these minority workers in greater numbers than non-minority employees with earlier dates of hire.

The Court of Appeals rejected the District Court's conclusion that this effect of the seniority-based layoff system rendered the system non bona-fide. Union Pet. App. A11, A41, A46. *A fortiori* it is a bona fide seniority system on this record.[3]

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[3] The Court of Appeals found it unnecessary to decide whether the City's agreement with Local 1784 containing a seniority-based layoff provision is valid under Tennessee law. The legality of that agreement is not controlling because the City itself decided to implement a seniority-based layoff procedure for handling personnel reductions City-wide in any event.

While it is true that in most cases the terms of a seniority system are embodied in a collective bargaining agreement between an employer and a union, neither Title VII, its legislative history, nor the decisions of this Court in any way indicate that a system uni-

Carl Stotts and Fred Jones, plaintiffs in one of the earlier cases who had been hired into the Fire Department prior to either of the earlier decrees, returned to the District Court seeking modification of the 1980 Decree to prevent these layoffs. Otherwise, plaintiffs argued, the gains achieved under the decrees would be vitiated by virtue of the disproportionate number of minorities who possessed insufficient seniority to avoid the layoffs. The District Court approved the relief requested by Stotts and Jones, enjoining the neutral implementation of the City's seniority system in order to accord minority employees special layoff protection at the expense of innocent senior white employees, who consequently lost their jobs. The Court of Appeals affirmed.

The purpose of this brief *amicus curiae* is to explore the ramifications of the lower court's modification of the

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laterally adopted by an employer without a discriminatory purpose cannot also be bona fide and therefore enjoy Section 703(h), 42 U.S.C. § 2000e-2(h), protection. See *Williams v. New Orleans Steamship Ass'n.*, 673 F.2d 742, 754 fn. 19 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1428 (1983); *EEOC v. E.I. duPont de Nemours & Co.*, 445 F. Supp. 223, 248 (D.Del. 1978). "That a current employee expects to have certain seniority rights because of a plan adopted at the employer's initiative, as opposed to a plan negotiated between labor and management, in no way diminishes that employee's expectations and it is those expectations which Section 703(h) was designed to protect." *EEOC v. E.I. duPont de Nemours & Co.*, 445 F. Supp. at 249. See also, *Cartagena v. Secretary of the Navy*, 618 F.2d 130, 134 (1st Cir. 1980) (Federal Personnel Manual promotion provision deemed bona fide seniority system); *Early v. Klassen*, —— F. Supp. ——, 15 FEP Cases 297 (D.D.C. 1977) (Postal Service tour of duty selection policy based on seniority deemed bona fide under § 703(h)); *Johnson v. Burroughs Corp.*, —— F. Supp. ——, 24 FEP Cases 963 (S.D. Fla. 1980) (Employer's unilaterally imposed seniority policy deemed bona fide under § 703(h)); *Campbell v. Washington*, —— F. Supp. ——, 24 FEP Cases 707, 713 (D.D.C. 1979) (Civil Service guidelines prescribing reduction in force procedures by seniority found bona fide under § 703(h)); *Bacica v. Board of Ed. of Sch. Dist. of the City of Erie, Pa.*, 451 F. Supp. 882, 886-7 (W.D. Pa. 1978) (seniority list neutrally employed by employer deemed bona fide).

1980 consent decree to override layoffs on a last-hired, first-laid off basis pursuant to a *bona fide* seniority system by granting a special layoff protection to minority employees solely because of their race and to show that the lower court's action in these circumstances exceeded the well-established limitations within which the federal judiciary must operate.

## ARGUMENT

### I.

The lower courts enjoined the routine operation of the Memphis seniority system solely because its impact retarded the attainment of minority percentage goals set forth in a consent decree. No claim was made that the system was being utilized intentionally to frustrate the decree. No claim was made that the City was using seniority based layoffs as a device to renege on its obligations under the decree. The District Court specifically found that "neither the layoffs nor the [layoff] policy adopted was intended to be discriminatory." Union Pet. App. A73, A78. Although minority percentage goals have not yet been achieved, this is in no way due to a lack of compliance. In the District Court, there was "no suggestion that [the City had] been contemptuous." Union Pet. App. A75. Despite its financial crisis, the City remained committed to maintaining an employment scheme free from racial discrimination. Faced with a financial need to cutback its workforce, the City relied on "the thing that has been used in every city in this country, in every business in this country, and by the city, and in the Consent Decree since 1974, and that is the seniority policy in the union agreement. . . ." Joint App. 37-38.

This Court too has long recognized the "vast and increasing importance" of seniority in this country's system of employment. *Franks v. Bowman Transportation Company, Inc.*, 424 U.S. 747, 765 (1976). "Competitive status" seniority, which determines "who gets or who

keeps an available job" in a layoff situation, has been described by this Court to possess "overriding importance" because it affects the economic security of an employee more than any other term or condition of employment. *Id.* at 766. See *American Tobacco Company v. Patterson*, 456 U.S. 63 (1982).

Congress has immunized the routine application of systems of competitive seniority which have been created or operated without a racially discriminatory purpose from the statutory prohibitions against employment practices which, although neutral on their face and in intent, nonetheless discriminate in effect against a particular group. *Teamsters v. United States*, 431 U.S. 324, 348-354 (1977). "[T]he unmistakable purpose of § 703(h) [of the Civil Rights Act of 1964] was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." 431 U.S. at 32.[4] In so holding in *Teamsters*, the Court placed its imprimatur on the validity of a practice whereby the longest tenured employees, even though they might without exception be white, would enjoy a " 'disproportionate distribution of advantages [which] in a very real sense [would] operate to 'freeze' the status quo of prior discriminatory employment practices' " (431 U.S. at 350). *Teamsters* acknowledged that this perpetuation effect could not overcome

[4] This Court has interpreted the term "seniority system" to mean "a scheme that . . . allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." *California Brewers Association v. Bryant*, 444 U.S. 598, 605-606 (1980). "The example of a 'seniority system' most frequently cited in the congressional debates was one that provided that the 'last hired' employee would be the 'first fired.' " *Id.* at 605, fn. 10.

There can be no serious dispute that the provisions of the Memphis plan represent what this Court has considered "the core concepts of 'seniority.' " *Id.* at 606. Rights of employees are determined solely according to length of employment. The principal feature of the Memphis system, "like any and every 'seniority system' is that preferential treatment is dispensed on the basis of some measure of time served in employment." *Id.*

"the congressional judgment . . . that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees. . . ." 431 U.S. at 353.[5]

Furthermore, although other civil rights laws do not contain any similar specific protective language, a seniority system which is neither discriminatory in genesis nor application is lawful under both the U.S. Constitution and the Civil Rights Act of 1866, 42 U.S.C. § 1981, which invalidate only employment practices discriminatory in their purpose as well as their effect. See *Washington v. Davis*, 426 U.S. 229 (1976) (Fourteenth Amendment); *General Building Contractors Association, Inc. v. Pennsylvania*, —— U.S. ——, 73 L.Ed.2d 835 (1982) (Section 1981). See also, *Johnson v. Ryder Truck Lines*, 575 F.2d 471 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); *Waters v. Wisconsin Steel Works of Int'l. Harvester Co.*, 502 F.2d 1309, 1320 n.4 (7th Cir. 1974), *cert. denied*. 425 U.S. 997 (1976).

Under these principles, the Memphis seniority system could not have been altered had its effects been challenged in a new action instituted and resolved on the same record before the lower courts as to the system's origins and purpose. Because its effects impacted on the terms of a prior consent decree however—the routine application of the system's "last-hired, first-laid off" provisions would have resulted in some minority employees hired by virtue of the remedial measures contained in the earlier consent decree temporarily losing their jobs—the district court deemed itself empowered to grant the injunction.

This effect of the seniority system, and this effect alone—i.e., the temporary delay in the complete realization of the voluntarily-agreed upon quotas in the work-

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[5] It is of no legal consequence that the City's seniority system was adopted after the passage of the Act. *American Tobacco Company v. Patterson, supra.*

force—became the linchpin for the modification of the consent decree to enjoin the routine operation of the system. In these circumstances, such relief was beyond the court's authority to grant.

## II.

A federal court's powers in equity of course are not boundless. In formulating its remedial decree, a court in equity must "look to the practical realities and necessities inescapably involved in reconciling competing interests" regardless of the source of those interests. *Lemon v. Kurtzman*, 411 U.S. 192, 201 (1973). This is especially the case "when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties." *Teamsters*, 431 U.S. at 375.

Where, as here, private litigants seek relief pursuant to federal statutes, the court's authority to fashion relief is further circumscribed by the limitations of the applicable statute, for its authority "comes only from the statute which [its] decree is intended to enforce." *System Federation No. 90 v. Wright*, 364 U.S. 642, 651 (1964). See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957); *Wheeldin v. Wheeler*, 373 U.S. 647, 651-652 (1963). Thus, a court concerned that harm has occurred is without authority to exercise its injunctive powers if the harm is the result of an act which is protected by statute. See, *TVA v. Hill*, 437 U.S. 153, 195 (1978) ("[I]n our constitutional system, the commitment to the separation of powers is too fundamental for [the courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'").

A federal court asked to modify a consent decree is further circumscribed in its authority by the scope of the decree itself. "[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. . . . and not as it might have been written had the

plaintiff established his factual claims and legal theories in litigation." *U.S. v. Armour & Company*, 402 U.S. 673, 681-682 (1971).[6]

Applying these principles to the case at hand, the lower court's holding simply does not stand up. First of all, the consent decree itself did not treat layoff protection or recall rights. It had as its objective a percentage increase in the number of minority employees in the ranks of the Fire Department. The agreed-upon means for attaining this objective was through the hiring and promotion processes—not through any program of seniority adjustment or firing of existing non-minority employees. There being no reference to layoffs, the decree must be interpreted as placing no restrictions on treatment of minority applicants once hired into the workforce any differently from other employees when layoffs become necessary.

The relief granted in the form of modification of the decree was wholly new to the terms of the compact and did not enjoy the blessing of both parties to the decree. The additional relief awarded by the District Court was

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[6] Even if no settlement had been achieved originally and the allegations in the complaint had been proven at trial, the relief the district court might have granted would have been limited "by the nature and extent of the . . . violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974). See, *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976). The complaint alleged hiring and promotion discrimination. Backpay and rightful place seniority for those persons able to prove they were denied hire or promotion on account of their race appropriately would cure the proven practice of the employer to intentionally refuse to hire or promote particular black persons. This individualized focus of laws protecting against employment discrimination has been analyzed and approved by this Court on numerous occasions. Title VII: *Franks v. Bowman Transportation Co., supra*; *Teamsters v. United States*, 431 U.S. at 357-377; *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 718 (1978); *Connecticut v. Teal*, —— U.S. ——, 73 L.Ed.2d 130, 141 (1982). Fourteenth Amendment: *Washington v. Davis*, 426 U.S. at 239. Section 1981: *General Building Contractors Association, Inc. v. Pennsylvania*, —— U.S. ——, 73 L.Ed.2d at 846-849.

in no sense voluntary.[7] It was rather, as conceded by the Court of Appeals, an effort to fill a gap overlooked by the respondents when the settlement was originally negotiated. Such gap-filling is totally inconsistent with the teachings of this Court in *Armour*.

Furthermore, no proper policy consideration underlies the modification. The Court of Appeals found the "strong policy favoring voluntary settlements" underlying Title VII to allow the seniority system to be overridden despite its acknowledged bona fides. Certainly such a policy favoring settlements exists—but so does an even stronger explicitly expressed policy protecting seniority.

This certainly is not a case where the statute is ambiguous so that one might reasonably question whether Congress intended to allow a seniority-override remedy here. Cf. *Transamerica Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-640 (1981). *Mortgage Advisors v. Lewis*, 444 U.S. 11 (1979). As shown earlier, Title VII on its face is explicit in its directive that the operation of a legitimate seniority system is inviolate and shall not be overridden despite any disparate impact it may cause. The proposition that voluntary compliance is preferable to litigation simply cannot justify a federal court shunting a clearly expressed legislative protection because the court perceives the equities of a case before it to so dictate. Nevertheless, that is precisely the crux of the lower courts' reasoning. App. A38.

The relief granted—requiring the maintenance of separate minority and nonminority lists with respect to seniority for layoffs and recall—was not designed to be that type of constructive seniority relief sanctioned by

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[7] It did not represent judicial approval of an agreement between the parties as was involved in *Bakke* (*University of California Regents v. Bakke*, 438 U.S. 265 (1978)) and *Weber* (*United Steelworkers of America v. Weber*, 443 U.S. 193 (1980)) both of which dealt with the legality of racial preferences in voluntary affirmative action programs.

this Court's opinion in *Franks*. Union Pet. App. A38. Consequently, minority employees not themselves victims of discrimination have been afforded relief by the district court as if they were. As beneficiaries of the affirmative action contained in the consent decree merely by virtue of their race, these employees had no basis for claiming any additional seniority or layoff protection. The district court's order granting it to them anyway contravenes Section 706(g) of the Act. 42 U.S.C. 2000e-5(g).

Furthermore, in this sense, the district court's order is not remedial. Rather than designed to safeguard the relief awarded individuals who have been subjected to discrimination—i.e. ensuring the "make whole" objective is met—the district court's order rewards non-victims of discrimination at the expense of innocent employees. These non-victims, all of whom now enjoy superseniority for purposes of layoff, have been placed in positions *higher* than they would have occupied had discrimination actually been proven. Their rightful place, as non-victims, was precisely where they stood prior to modification of the decree. Absent some individualized determination to the contrary, no proper equitable basis existed to place them anywhere else.

Finally, regardless of the purported statutory or Constitutional basis for the lower courts' decisions, the fact remains that the lone rationale for the decisions is not discrimination—it is race. We reiterate that no finding of discrimination has ever occurred in this case. The only reason respondents were kept working for the Memphis Fire Department while their more senior fellow employees were sent home is because respondents are black and their colleagues are white. Basic principles of equity do not justify taking a job away from an innocent employee so to create a position for another who has suffered no discrimination and whose only credential for the award is that he was born a different color.

In *Teamsters* the Court called for resort to the "qualities of mercy and practicality" in devising a remedy where the restoration of victims of discrimination is weighed against "the legitimate expectations of nonvictim employees." 432 U.S. at 374-375. Where, as here, there are nonvictims on both sides of the scale, awarding preferences to one based solely on race renders the burden on the other all the more onerous. Cf. *Ford Motor Co. v. EEOC*, — U.S. —, 73 L.Ed.2d 721, 737-738 (1982). In this situation, the "qualities of mercy and practicality" emphasized in *Teamsters* do not justify the relegation of non-minority employees to the unemployment lines. Unfortunately this is a consequence of the lower court's analysis which seems to have eluded its consideration.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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